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1 Q. And did you ask Mr. Berry to file this
2 notice of bankruptcy?

3 A. Well, I think it was required by law.
4 But, yeah, I consented to it.

5 Q. Okay.

6 A. Yes.

7 MR. SHIELDS: Okay. Your Honor, can I
8 have a brief break and talk to co-counsel? I may be
9 done with this witness.

10 Thank you, Mr. Christensen.

11 That's all the questions we have of this
12 witness, Your Honor.

13 MR. BOLEY: Morning, Your Honor.

14 Matthew Boley appearing on behalf of VS Fox Ridge,
15 LLC.

16 THE COURT: Good morning.

17 MR. BOLEY: Your Honor, I have some
18 questions within the scope of the direct and also
19 some additional questions I was planning to ask
20 during the debtors' case. For convenience, do you
21 want me to cover it all now?

22 THE COURT: Why don't you just focus on
23 your direct.

24 MR. BOLEY: The cross-examination only?

25 THE COURT: Right.

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1 MR. BOLEY: Okay, Your Honor.

2

3 CROSS-EXAMINATION

4 BY MR. BOLEY:

5 Q. Mr. Christensen, you were asked a number
6 of questions about your statements and schedules.
7 And let me have you turn to Exhibit 1. And let's
8 turn to question number 13 on schedule B of your
9 personal schedules. Just give me a minute and I'll
10 help you find that. That would be page 3 of 9. It's
11 just a few pages in. You there?

12 A. Yes.

13 Q. You've listed, under question number 13,
14 that you personally and your wife own interest in VS
15 Fox Ridge, LLC and in a company called Mountain Home
16 Development Corporation; is that correct?

17 A. Yes.

18 Q. And you've identified that your wife is
19 the owner of 12.5 percent-ish of Mountain Home
20 Development Corporation?

21 A. Yes.

22 Q. I think during your earlier testimony you
23 referred to the Traverse companies or the Traverse
24 entities. Can you tell us what those are?

25 A. Well, primarily -- the primary --

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1 primarily the companies are Triumph Commercial
2 Investments 3, which they changed that name from --
3 previously it was Fox Ridge Investments. When I say
4 "they," I mean the Traverse Mountain -- I don't even
5 know if it was the board but the CEO and corporate
6 counsel changed that name. It's Mountain Home
7 Development and Land Com. And some dispute over
8 Solitude, whether it's part of those companies. And
9 then there's so many subsidiaries that they've
10 formed, I don't know all the names of them. And I
11 don't know how many they've done and I've never been
12 informed as to how many of these companies have been
13 broken off the main parent companies.

14 Q. Let me ask it this way: Is Mountain Home
15 Development Corporation, is that one of the three
16 entity that is you commonly refer to as the Traverse
17 entities?

18 A. Yes.

19 Q. Okay. And then let's turn probably about
20 18 or so pages forward to page 13 of 31 of the VS Fox
21 Ridge schedules. I apologize, there's not numbering
22 at the bottom, but it will be 13 of 31 at the top.

23 A. Yes.

24 Q. And you've listed here Land Com Financial
25 Group with a 25.5 percent interest?

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1 A. Yes.

2 Q. And Fox Ridge Investments, LLC with a
3 16.728 percent interest?

4 A. Yes.

5 Q. Land Com, Fox Ridge, and Mountain Home,
6 are those the three companies you commonly refer to
7 as the Traverse entities?

8 A. Yes. And their related entities.

9 Q. Tell us what those three entities
10 collectively own and what their business is. Well,
11 actually, let me --

12 MR. BOLEY: Your Honor, may I approach?

13 THE COURT: Yes.

14 MR. BOLEY: I have an exhibit that's not
15 marked. It'll be used for demonstrative purposes
16 only.

17 Q. (By Mr. Boley) I've just handed you a
18 document. Just what is the document I've handed you?

19 A. It's an aerial photo of Lehi and the
20 Traverse Mountain project --

21 Q. Right.

22 A. -- and some of Suncrest and the
23 surrounding properties.

24 Q. And will you describe to the Court what
25 the assets, at least to your knowledge, what the

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1 assets and business of the Traverse entities are.

2 A. It's approximately a 2,700-acre master
3 plan community on the 1-15 freeway. And it entails
4 -- did entail about 8,000 residential homes or lots
5 and approximately 3,600,000 feet of commercial
6 shopping center property that was entitled, that we
7 entitled. And today I think it's been reduced down
8 to about 6,000 residential lots. But it's still
9 about 3,400,000 square feet of shopping, much of
10 which is under development right now and ongoing.

11 Q. Tell us what, other than ground that's
12 potentially entitled, what is actually being
13 developed out there?

14 A. Right now, where this pink area is, I
15 negotiated -- well, our company negotiated the
16 Cabela's agreement. And they're open and running and
17 have been for many years now. Being attached to it
18 is the Steve Craig factory outlets. Those are one of
19 the larger factory outlet builders in the nation, and
20 he's building right next-door to Cabela's in this
21 pink area.

22 Q. And when is that slated to open?

23 A. It's slated to open before Christmas of
24 this year.

25 Q. Okay.

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1 A. It's about -- with Cabela's, it's about --
2 close to the size of the Gateway shopping center, the
3 Gateway downtown Salt Lake City shopping center.
4 There's enough to put probably two more Gateway-sized
5 shopping centers on the commercial property.

6 Also, in the pink aerial on the freeway,
7 Adobe is just -- it was Omniture that sold out to
8 Adobe. But my son and I brought that Omniture
9 proposal, and then they were bought out by Adobe to
10 the company's board several years ago. And they're
11 building and getting ready to open right along the
12 freeway as well on about approximately 20 acres or
13 so. And that's just -- they're just about ready to
14 have their grand opening. I don't know what the
15 exact date is.

16 Q. The three things you've identified, the
17 Adobe building, the Cabela's, and the factory
18 outlets, are those all projects that you were
19 involved in while you were managing the Traverse
20 entities?

21 A. Yes.

22 Q. Are you aware of any development that's
23 occurred other than the development that you started
24 while you were managing the entities?

25 A. I'm not aware of anything that's broken

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1 ground or been built besides these entities.

2 Q. Okay. What do you believe to be the
3 income potential for your share of the stock, so this
4 estate's share of the stock in those entities based
5 on the development that's there?

6 A. I really don't know that answer because
7 they -- Traverse Mountain entities aren't sharing
8 enough information with us to know. But I can only
9 estimate. I mean, I've estimated in these reports
10 the range that it could be in, and it would be
11 somewhere within that framework. But we need more
12 information from the Traverse Mountain entities.

13 Q. Let me ask you a question about your
14 schedule B in your personal case. You don't need to
15 turn to it. But when you listed the 12.5 percent
16 interest your wife holds in Mountain Home Development
17 Corporation, you didn't put a value. You put
18 unknown.

19 A. Yes.

20 Q. Why did you put an unknown value?

21 A. There's a lot of reasons. They just --
22 there have been so many things that have happened
23 with the property since they're involved. The
24 litigation explains much of it that it has -- what
25 the charges are and why we don't know.

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1 Q. Let me see if I can speed this up. Did
2 you put unknown because you don't know what assets
3 have been sold, what assets have been pledged to
4 different lenders, and what assets have been lost to
5 foreclosure?

6 A. Yes.

7 Q. And so you knew what the assets were and
8 what the balance sheet of the companies, the Traverse
9 companies looked like in 2009 when you handed over
10 the reins, right?

11 A. Yes. It was a pretty bad economy but, I
12 mean --

13 Q. You don't know what the balance sheet of
14 the entities that you own stock in is today?

15 A. No.

16 Q. Okay. And the only way to determine the
17 value of that stock is to probably do some discovery
18 to find out what assets and liabilities those
19 companies have; is that fair?

20 A. Discovery would be essential --

21 Q. Okay.

22 A. -- for Traverse Mountain companies to
23 share that with us.

24 Q. You were also asked -- and I'm going to
25 have you turn back to early in Exhibit 1, back to

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1 schedule B of your Steve and Vicky amended schedules.
2 You were asked, and you gave some testimony about
3 this member loan. And I don't know that it was
4 altogether clear to me, so I just want to ask some
5 clarifying questions. The member loan you've listed
6 here, is this the money you borrowed from Key Bank
7 and then you turned around and loaned it to the
8 companies; is that right?

9 A. That's part of it.

10 Q. What else is it?

11 A. There's money that I didn't take in the
12 way of salary and at interest and other sums owed to
13 me that I didn't take for a great deal of time that
14 were added on as part of the debt to go along with
15 the loan that I made to the company.

16 Q. And when you were asked about whether this
17 claim was a disputed claim, you made reference to a
18 settlement agreement. The settlement agreement
19 doesn't say this is a disputed claim, does it?

20 A. No.

21 Q. The settlement agreement says that the
22 Traverse entities will pay you this amount of money,
23 right?

24 A. Yes.

25 Q. They just haven't done it yet?

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1 A. Yes.

2 Q. You were also -- on that same page you
3 were asked a question about the second entry under
4 question 16 that says points and fees due from
5 Traverse Mountain companies. Do you see that?

6 A. Sorry, I'm --

7 Q. It's on page 3 of 9.

8 A. Okay.

9 Q. Of docket number 42 at the top.

10 A. Yes.

11 Q. Okay. You're with me?

12 A. Yes.

13 Q. You have a second exhibit binder that has
14 lettered tabs in it. If you could grab that and turn
15 to tab O, please.

16 A. In this same bind -- in the same --

17 Q. In the binder with letters.

18 A. Okay. Okay.

19 Q. What is Exhibit O?

20 A. It's a copy of the resolution approving
21 compensation of owners of the Traverse Mountain
22 companies who guarantee loans.

23 Q. How did you come to have a copy of Exhibit
24 O?

25 A. Traverse Mountain sent this copy to me.

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1 There was another one, but they sent this particular
2 one to me.

3 Q. Did they send you copies of the
4 resolutions that are passed?

5 A. No, they don't. I very rarely get them.
6 This one just happened to be sent at the end of the
7 year.

8 Q. Okay.

9 MR. BOLEY: Your Honor, I offer Exhibit O.

10 MR. SHIELDS: Your Honor, may I voir dire
11 the witness?

12 THE COURT: Yes.

13

14 VOIR DIRE EXAMINATION

15 BY MR. SHIELDS:

16 Q. Mr. Christensen, this resolution,
17 Exhibit O, your counsel referred to you, did you
18 draft this?

19 A. No.

20 Q. Do you know who did?

21 A. I believe Mark Rinehart, corporate counsel
22 did.

23 Q. Do you know when?

24 A. There was one -- there's two of these.
25 The first one was drafted, I think, in September,

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1 October. I don't know, something like that. And
2 then I think it was amended to this one maybe in
3 November. And then I was sent it in December,
4 something -- or December, January 1st. I don't know
5 the exact date.

6 Q. Were you in the meeting when this
7 resolution passed?

8 A. No.

9 Q. Where did you get this?

10 A. This I got sent to me by Ted Heap, CEO and
11 corporate counsel, at the end of the year. It's also
12 been used in previous litigation and depositions.

13 Q. End of what year?

14 A. Of 2009. I believe it was 2009. Maybe it
15 was -- no, excuse me. It might have been -- if they
16 sent it in January, I believe it would have been
17 2010. If they sent it -- gave it to us in -- earlier
18 than that, I don't know.

19 Q. And you believe Exhibit O is the current
20 resolution or the outdated resolution?

21 A. Well, I don't know that it's outdated. I
22 know they amended it. But I don't know.

23 Q. Okay. Is O --

24 A. I suspect --

25 Q. Just a minute. Is O the amended then or

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1 is it the pre-amended?

2 A. I'm not quite certain without reading it
3 all the way through. I think it is the amended one.

4 Q. Okay.

5 MR. SHIELDS: Thank you, Your Honor. We
6 have no objection.

7 THE COURT: Well, I do. It's not dated,
8 it's not signed, and he didn't draft it. I don't
9 know what it is.

10 MR. BOLEY: Your Honor, we offer it as a
11 resolution that was transmitted to Mr. Christensen by
12 officials of the company as official board action.
13 It's offered for that.

14 THE COURT: All right. Well, there's no
15 objection so it's received.

16 (EXHIBIT 0 IS RECEIVED.)

17

18 CONTINUED CROSS-EXAMINATION

19 BY MR. BOLEY:

20 Q. Now, if you look at the bottom of
21 Exhibit 0, there's a resolution and then there's some
22 lettered paragraphs. And lettered paragraph A says
23 "For guaranteeing the loan at closing, a onetime
24 guarantor's fees paid in cash out of the proceeds of
25 the loan in the amount of 10 percent."

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1 Do you see that?

2 A. Yes.

3 Q. Is this the basis upon which you're
4 claiming the \$250,000 in points and fees that you've
5 listed on schedule B of your personal schedules?

6 A. Yes. And I don't have the previous one,
7 but I think the resolutions under A would provide me
8 with that, those points and fees, yes.

9 Q. And if you'll turn to the second page of
10 Exhibit 0, subparagraph D states, "In addition to the
11 foregoing if there is a default at any time for any
12 reason under any document related to the loan," so
13 that's a loan you've guaranteed, "any guarantor shall
14 be entitled but not required to acquire a lender's
15 position and/or to buy the loan from the lender of
16 the loan on any terms agreeable to the guarantor and
17 the lender and then to enforce the terms of the loan
18 so acquired without any conflict of interest or
19 breach of fiduciary duty."

20 Do you see that?

21 A. Yes.

22 Q. What did you understand this to authorize
23 you to do?

24 A. Just what it says, that if the loans -- if
25 I'm a guarantor on the loan and the loan goes into

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1 default, then I have the rights that are outlined
2 here in order to protect my family and our family's
3 guarantee under any terms agreeable to the guarantor
4 and the lender and then enforce the terms. I could
5 go out and acquire financing to pay off this loan to
6 protect myself. And actually, the way they passed
7 this resolution, "they" meaning the Traverse Mountain
8 companies, I could then turn around and enforce it
9 against them. And of course they could also do it
10 against us. I might add we didn't vote for this; my
11 family. I know -- we just -- I know we didn't vote
12 for this. The Traverse Mountain companies did.

13 Q. Why don't we stop there. I want to stay
14 within the scope of the direct examination. So let
15 me move on.

16 You were asked some questions and Forge
17 was listed on both your personal schedules and on VS
18 Fox Ridge's schedules; is that correct?

19 A. Yes.

20 Q. That's because us personally and VS Fox
21 Ridge, LLC signed guarantees of the two U.S. Bank
22 loans?

23 A. Yes.

24 Q. Now, you marked those as disputed, right?

25 A. Yes.

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1 Q. And you testified about that. And I just
2 want to make sure that the record's clear. The
3 reason you marked those as disputed is because
4 although you don't dispute you owe the money, you
5 don't know the correct amount?

6 A. Yes.

7 Q. Okay.

8 MR. SHIELDS: Your Honor, I'm going to
9 object. I let it go for a while, but he's leading
10 the witness. This is his witness, he should ask --

11 MR. BOLEY: This is cross-examination,
12 Your Honor.

13 THE COURT: He's your witness.

14 MR. BOLEY: Let me ask the question again.

15 THE COURT: Well, no, he's already
16 answered. I understand the answer, and that's the
17 way he testified before. There's no need to. He's
18 just --

19 MR. BOLEY: Oh. Sorry, Your Honor.

20 THE COURT: No.

21 MR. BOLEY: I didn't know it was as clear
22 before.

23 THE COURT: It was clear to me.

24 MR. BOLEY: Because you just pierced right
25 through it.

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1 THE COURT: Yeah.

2 Q. (By Mr. Boley) Let me move on then to
3 some questions. And let's turn to the VS Fox Ridge
4 schedule B. Remember we turned about 20 or so pages
5 ahead. And I'll get there and then help direct you
6 to the right page. So this would be page 14 of 31
7 with docket number 44 at the top.

8 A. Okay. Is this -- could I -- I'm sorry, is
9 this water I can just --

10 THE COURT: Yes.

11 THE WITNESS: Okay. Is it all right if I
12 --

13 THE COURT: Would you like a break, Mr.
14 Christensen?

15 THE WITNESS: No. Actually, I'm doing
16 okay. I just need a little sip here.

17 MR. BOLEY: Does Your Honor want to take a
18 brief break? May I approach?

19 THE COURT: If it would be helpful to you,
20 it would be helpful to me, yeah.

21 MR. BOLEY: Let's take --

22 THE COURT: So why don't we take a
23 ten-minute break.

24 THE BAILIFF: All arise.

25 (Break was taken from 10:26 to 10:29 a.m.)

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1 THE BAILIFF: All arise. The Court
2 resumes its session.

3 Please be seated.

4 THE COURT: All right. Thank you. Go
5 ahead, Mr. Boley.

6 MR. BOLEY: Your Honor, before we resume
7 this testimony I ask the Court's indulgence.

8 Mr. Lavar Christensen was one of our witnesses on our
9 "may call" list and he's popped in. He's here in the
10 courtroom from another hearing. He's got to leave.
11 And I would ask the opportunity just to offer one
12 exhibit for him and make a one sentence proffer of
13 his testimony so that we can excuse him.

14 THE COURT: Any objection, Mr. Shields?

15 MR. SHIELDS: Which exhibit is that,
16 Counsel?

17 MR. BOLEY: That would be Exhibit G which
18 is an e-mail that Mr. Lavar Christensen authored.

19 MR. SHIELDS: Your Honor, I have no
20 problem. But that's our Exhibit A to which Mr. Boley
21 has objected to, so...

22 MR. BOLEY: I don't think so.

23 MR. SHIELDS: Our Exhibit 7, is it?

24 MR. BOLEY: I don't think they're the
25 same.

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1 MR. SHIELDS: I think it's one of the same
2 ones you've objected --

3 MR. BOLEY: I don't think they're the
4 same. I may have mistaken it with this. Did I
5 already stipulate to that one?

6 UNIDENTIFIED SPEAKER: No, you objected to
7 it. And now you're trying to get it in as --

8 MR. BOLEY: No. I made a mistake. I
9 mistook, Your Honor, Exhibit 7 for Exhibit 8. I
10 don't have an objection to Exhibit 8, obviously.
11 It's one of our exhibits. So I would offer
12 Exhibit 8, which is the movants' exhibit. And then
13 I'll have just a one sentence proffer.

14 MR. SHIELDS: No objection, Your Honor.

15 THE COURT: I'm sorry. Go back. So --

16 MR. BOLEY: So Exhibit G in the debtors'
17 exhibits and Exhibit 8 in the movant's exhibits are
18 the same. I got mistaken. I didn't realize they
19 were.

20 THE COURT: Okay.

21 MR. BOLEY: So I offer Exhibit 8.

22 THE COURT: And G?

23 MR. BOLEY: I suppose it wouldn't hurt.
24 Although, they're the same thing.

25 THE COURT: All right. Exhibits 8 and G

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1 are received.

2 (EXHIBITS 8 AND G ARE RECEIVED.)

3 So do you need Mr. Lavar Christensen to
4 testify about anything else?

5 MR. BOLEY: Just one sentence, Your Honor.
6 If called to testify, Mr. Lavar Christensen would
7 testify that McKay Christensen was ready, willing and
8 able to appear for deposition on Wednesday, June
9 27th. And that was communicated to Mr. Preston, and
10 Mr. Preston chose to cancel the deposition. Just
11 that one sentence.

12 MR. SHIELDS: Your Honor, I have no
13 objection to that. But we'd also ask that the
14 exhibits -- our Exhibit 7 be admitted. That is an
15 exhibit with Lavar Christensen being on the sender
16 line. And since he's here, we'd ask that that also
17 be admitted and that we call him to get that into
18 evidence now.

19 MR. BOLEY: So stipulated, Your Honor.

20 THE COURT: All right. Exhibit 7 is
21 received as well.

22 (EXHIBIT NUMBER 7 IS RECEIVED.)

23 MR. BOLEY: With that, Your Honor, may
24 Mr. Lavar Christensen be excused?

25 THE COURT: Mr. Shields?

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1 MR. SHIELDS: No objection, Your Honor.

2 THE COURT: All right. Mr. Lavar
3 Christensen's excused.

4 MR. BOLEY: Thank you, Your Honor.

5

6 CONTINUED CROSS-EXAMINATION

7 BY MR. BOLEY:

8 Q. Mr. Christensen, I just have a couple more
9 questions to finish cross-examination. And I lost
10 the page, but when we broke I think you were --
11 excuse me, Your Honor. When we broke I believe you
12 were looking at page 14 of 31 of docket number 44
13 which lists claims.

14 A. Yes.

15 Q. Okay. You previously testified about what
16 the first item under question number 21 is. I
17 believe you were confused. And I'd ask you at this
18 point to clarify what it is you were referring to
19 when you identify rights of contribution and/or
20 indemnity arising under organizational documents.

21 A. Yeah. I believe this applies to the
22 operating agreement, the Traverse Mountain companies
23 operating agreements. There's a provision that says
24 that if I have a personal guarantee, or any of us,
25 anybody who personally guarantees a loan and list --

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1 the lender forecloses or comes against us for any
2 kind of an action like a deficiency judgment, then I
3 have the right to, in the operating agreement in my
4 case and the other guarantors would have it as well,
5 but I have a right to turn and ask -- or demand from
6 all of the shareholders and all of the partners in
7 the operating agreement, there's a provision that
8 says anyone owning more than 4 percent would pay up
9 to 150 percent of the amount that I have to pay as a
10 guarantor to reimburse me. I can look to them to
11 reimburse me for my damages and my losses as a
12 guarantor on the loan.

13 Q. So as an example, if you paid a million
14 dollars to Forge on your personal guarantee, you
15 would have the right to turn to shareholders owning 4
16 percent or more of the Traverse entities in column M
17 to indemnify you and hold you harmless?

18 A. Up to 150 percent, yes.

19 Q. And you previously said that this claim
20 that we've identified was involved in litigation;
21 that's incorrect?

22 A. Yeah.

23 Q. Because to this point you've not paid on
24 any guarantee.

25 A. Correct.

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1 Q. So you've never asserted this claim in any
2 state court litigation anywhere?

3 A. Not to my knowledge.

4 Q. The second claim that's identified starts
5 claims for converse breach of fiduciary duty and goes
6 on. Would you tell the Court which court and which
7 judge that case is pending in front of?

8 A. I'd like to just read through this for
9 just a moment.

10 Q. Sure.

11 A. I believe all of these -- I believe all of
12 these are in the Toomey, the Judge Toomey case.

13 Q. And to your knowledge these claims are not
14 pending in the actions before Judge Taylor and
15 Laycock, correct?

16 A. Not to my knowledge.

17 Q. Finally, the claim that you've identified
18 as a claim against RR Penga and Ross Stokes, that's
19 not a claim that's been previously filed with any
20 court?

21 A. No.

22 MR. BOLEY: Your Honor, that's all I have
23 for purposes of cross-examination. The debtors may
24 call Mr. Christensen in their case in chief.

25 THE COURT: Mr. Shields, any further

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1 questions?

2 MR. SHIELDS: Yes, just a couple, Your
3 Honor.

4

5 REDIRECT EXAMINATION

6 BY MR. SHIELDS:

7 Q. Would you look at Exhibit 0, Mr.
8 Christensen? This is the debtors' Exhibit 0. It's
9 in the other book. The resolution you testified
10 about in response to questions from your counsel.

11 A. Yes.

12 Q. Now, you're not sure if this is the
13 original or the amended, are you?

14 A. I'm not sure. Excuse me, I'm not sure.

15 Q. Would you look at subparagraph D on page 2
16 that your counsel had you read.

17 A. Do you want me to read it again?

18 Q. No. Just look at it. Is this the
19 paragraph you relied upon when you negotiated with
20 Forge to buy the U.S. Bank debt?

21 MR. BOLEY: Objection, assumes facts not
22 in evidence.

23 MS. OLSEN: Same objection, Your Honor.

24 THE COURT: I'm sorry, Mr. Shields, where
25 are we? I was making notes from the last questions

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1 about --

2 MR. SHIELDS: Paragraph D.

3 THE COURT: -- paragraph 21.

4 MR. SHIELDS: Okay. Paragraph D of
5 Exhibit 0, the debtors' Exhibit 0, which Mr. Boley
6 asked the witness to read. And it says, "In addition
7 to the foregoing, if there is a default at anytime
8 for any reason under any doctrine relating to the
9 loan, any guarantor shall be entitled but not
10 required to acquire the lender's position and/or to
11 buy the loan from the lender of the loan or any terms
12 agreeable to the guarantor and the lender. And then
13 to enforce the terms of the loan so acquired without
14 any conflict of interest or breach of fiduciary duty
15 to any TM companies or any owner of any TM companies
16 that might otherwise arise -- otherwise apply." The
17 question I asked Mr. Christensen: Is this the
18 paragraph he relied upon when he negotiated with
19 Forge?

20 MR. BOLEY: I objected that that assumes
21 facts not in evidence.

22 MS. OLSEN: Same objection, Your Honor.

23 THE COURT: Like what?

24 MR. BOLEY: It assumes there was
25 negotiates with Forge. There's no evidence of

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1 negotiations with Forge. I read this to the witness
2 and asked him his understanding. That was the prior
3 testimony.

4 THE COURT: Okay.

5 MR. BOLEY: This question assumes facts.

6 THE COURT: All right.

7 MR. BOLEY: That have not been
8 established.

9 THE COURT: Which is an invitation to you,
10 Mr. Shields, to back up and lay a few --

11 MR. SHIELDS: Yeah.

12 THE COURT: -- questions before you get
13 there.

14 MR. SHIELDS: Okay.

15 Q. (By Mr. Shields) Okay. Remind me what
16 did you respond to your counsel's question when he
17 asked you about paragraph D? What's your
18 understanding?

19 A. Well, I said that the resolution -- there
20 was one resolution that was done around September,
21 October. And it was amended in November.

22 Q. No. Let's focus on paragraph D, not the
23 -- paragraph D.

24 A. Okay. And then this was one of the facts
25 that went into consideration for me trying to project

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1 my guarantees when this was passed by the board. But
2 there were many other considerations that went into
3 it after advising with our attorneys and sitting down
4 and talking with them. And I don't remember all of
5 the reasons. But this was one of the reasons and one
6 of the examples of me knowing that I needed to be
7 able to project my guarantees. Because the other
8 side of this is they passed this and it meant they
9 could go on out, meaning the board, the CEO, the CFO,
10 they could go on out and get loans, get somebody to
11 come in and sue me for the damages.

12 Q. So what have you done since they passed
13 this to protect your guarantee?

14 A. I've tried to go out and talk to different
15 people to see if I couldn't find someone to help pay
16 this loan off.

17 Q. Did you talk to U.S. Bank?

18 A. I talked to U.S. Bank. U.S. Bank would
19 call me and we'd talk about -- we were in
20 foreclosure. And they were talking to all of the
21 guarantors at different times. And they were
22 pursuing the foreclosure and they were talking to our
23 attorneys on a regular basis about the foreclosure.

24 Q. Did you talk to representatives of Forge?

25 A. At some point in time I did.

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1 Q. And did you rely upon this paragraph in
2 doing so?

3 A. I wouldn't say that I relied solely upon
4 this. It was just a factor in trying to --

5 Q. I didn't ask solely. Did you rely upon
6 this paragraph, partially?

7 A. I think to some degree I did.

8 Q. Okay.

9 A. But there were many other factors that
10 came into play as well.

11 Q. Like what?

12 A. Just wanting to protect my guarantee. I
13 was talking to many people. And I didn't know if it
14 would be able to -- if it would apply solely under
15 this or if it would just be something that --

16 Q. Did you --

17 A. -- came under the operating agreements of
18 some of the other documents that exist.

19 Q. Did you look to the settlement agreement
20 to see if this type of conduct was prohibited?

21 A. Our attorneys did.

22 Q. Did you?

23 A. I mean, generally, yeah, I understood some
24 of the terms of the settlement agreement.

25 Q. Isn't it true that it is prohibited?

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1 A. No.

2 Q. So the way you read the settlement
3 agreement, you could buy loans of the company?

4 A. I'd like to -- I'll share -- in the Toomey
5 case, Judge Toomey found that Steve Howcroft, the
6 independent fifth board member, had made drastic
7 changes because of his prior relation -- she left the
8 door open for the fact that he had a prior
9 relationship of 15 years with the CEO and CFO and
10 corporate counsel, that they were all friends, which
11 I didn't know. And in there Mr. Howcroft signed that
12 settlement agreement that you're referring to. He
13 was required to sign it as the independent fifth
14 board member. And he did away with provisions that
15 were in that agreement. There was supposed to be a
16 \$250,000 cap in the ordinary course of business and a
17 \$500,000 cap in the ordinary course of business from
18 Mr. Heap. He couldn't go beyond that without coming
19 to the board. Mr. Howcroft voted to do away with all
20 of that and gave him carte blanche complete authority
21 to go off and do whatever he needed to do and many
22 other things. He voted to alter and amend the
23 settlement agreement and change it drastically.

24 Q. We're getting off base here, though.

25 A. Well, you asked me about the settle -- I'm

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1 sorry.

2 Q. The question is -- your review of the
3 settlement agreement, did it allow you to negotiate
4 with Forge and U.S. Bank to buy that debt against the
5 company?

6 A. I believe because of all the changes that
7 Mr. Howcroft made as the independent board member to
8 the original settlement agreement and increasing the
9 authority of the independent -- I mean, of the CFO to
10 go off and do whatever he wanted to do and not come
11 back and even clear it with the board, contrary to
12 what the settlement agreement said, that, along with
13 these resolutions -- and I can't -- there are many
14 other resolutions and there were many other things
15 that were done. I know it's part of our Toomey
16 litigation. And I can't remember all of the
17 instances, but I know our attorneys know --

18 Q. Okay.

19 A. -- that I didn't --

20 Q. Let me summarize. And what you're saying
21 is that because the settlement agreement, in your
22 mind, was amended because of conduct by Howcroft and
23 others, that you were authorized to negotiate with
24 Forge and U.S. Bank?

25 A. Well, and I'm also saying because of the

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1 resolutions. Maybe not just --

2 Q. And this resolution, Exhibit 0?

3 A. Yeah.

4 Q. Okay.

5 A. Partly because of that as well.

6 Q. Okay. Anything else besides this
7 resolution and the amendments that you think --

8 A. The things that I've listed. I mean, it's
9 in our litigation with -- in all of our litigation
10 that's been filed and the actions that were taken by
11 the companies, Traverse Mountain companies.

12 Q. Let me just ask you one other question.
13 The next paragraph on page 2 of Exhibit 0 says
14 "Further resolved." Do you see that? Exhibit 0,
15 page 2, right after the paragraph D we've been
16 referring to.

17 A. I'm on page 2.

18 Q. The last paragraph on page 2 of Exhibit 0.

19 A. D?

20 Q. After paragraph D.

21 A. Oh, okay.

22 Q. It says, "Further resolved" in all caps.
23 Do you see that?

24 A. Yeah. Excuse me, I'm sorry. Yes.

25 Q. "Further resolved that all guarantors of

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1 loans shall enter into a contribution agreement as
2 described above on terms determined necessary or
3 proper by Ted Heap, the CEO of the TM companies, in
4 his sole discretion as a condition to having the
5 rights and benefits described above." Do you see
6 that paragraph?

7 A. Yeah. That's what they --

8 Q. Do you understand -- just a minute. Do
9 you understand that?

10 A. That's an example of how they altered the
11 settlement agreement.

12 Q. Let me ask you, did you ever sign --

13 A. It didn't give -- it didn't give Ted Heap
14 that authority until Mr. Howcroft turned and swept
15 that aside in the settlement agreement and gave him
16 this --

17 Q. Let me ask the question. Did you ever
18 sign such a contribution agreement?

19 A. I haven't.

20 Q. Okay. Thank you.

21 A. Well, in the original operating agreements
22 I did.

23 MR. BOLEY: That's all the questions we
24 have, Your Honor.

25 THE COURT: All right. Thank you.

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1 Mr. Christensen, you may step down.

2 Mr. Shields, do you have other witnesses?

3 MR. SHIELDS: Yes, Mr. Brent Manning,
4 please.

5 THE BAILIFF: Please come forward to this
6 mic and raise your right hand.

7

8 Brent Manning,

9 called as a witness, being first sworn,
10 was examined and testified as follows:

11

12 THE BAILIFF: Please take the witness
13 stand and state your full name for the record.

14 THE WITNESS: Brent V. Manning.

15

16 DIRECT EXAMINATION

17 BY MR. SHIELDS:

18 Q. And Brent, you're an attorney licensed to
19 practice in the State of Utah; is that correct?

20 A. I am.

21 Q. How many years?

22 A. Have I been an attorney or in Utah?

23 Q. Yeah.

24 A. I've been an attorney for more than 37
25 years. I started out in Colorado, and I've been in

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1 Utah since the early '80s.

2 Q. And what's the nature --

3 A. Probably 1980, '81.

4 Q. What's the focus, the nature of your
5 practice?

6 A. I'm a commercial litigator.

7 Q. And have you been involved in representing
8 the Traverse Mountain companies including Ted Heap
9 and affiliated companies referred to as the TM
10 companies in this case?

11 A. I have.

12 Q. How long?

13 A. I was first engaged to represent the
14 companies in the defense of the claims brought by
15 Mr. Christensen and the other debtors here, as well
16 as his sister and her family.

17 Q. So and that's -- I think that's been
18 referred to as the Judge Toomey litigation. She's
19 the judge in that case now?

20 A. That's correct.

21 Q. Could you give the Court just a brief --
22 we don't want to go through the whole history. But
23 give the Court a brief background to how that case
24 started, how it ended up before Judge Toomey, and the
25 role you played in representing the TM companies.

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1 A. The litigation was originally filed in
2 Utah County. That was the wrong venue under the
3 settlement agreement. We moved to dismiss. They
4 brought a claim under the settlement agreement. The
5 -- to try to evade that, they dropped the claim under
6 the settlement agreement from their compliant; they
7 amended it. The court in Utah County, I guess,
8 didn't appreciate that tactic; transferred the case
9 to Judge Toomey. A reasserted claim under the
10 settlement agreement in Judge Toomey's case, and that
11 case has been pending before Judge Toomey since --
12 until the stay was entered.

13 Q. The bankruptcy stay?

14 A. That's correct.

15 Q. And so she's been the judge most of the
16 case just early on because it was filed in Utah
17 County.

18 A. Only the motion to change venue was heard
19 in Utah County.

20 Q. Okay. And who brought the case? The TM
21 companies are the defendants in that case; is that
22 correct?

23 A. That's right. It was Mr. Christensen, all
24 of the debtors, McKay Christensen, Mr. Christensen's
25 son, all of the Christensen family essentially.

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1 Q. And what were the core allegations?

2 A. Well, they're pretty much described in the
3 schedule here. It was a claim for entitlement to
4 information, claim for breach of fiduciary duty,
5 claim for conversion, waste of corporate assets; a
6 laundry list of essentially everything that one could
7 imagine.

8 Q. And what --

9 A. Procedurally at the outset, we filed --
10 instead of answering, we filed a motion to dismiss
11 for summary judgment. Because although the claims
12 were, I think it was the -- like a 60-page complaint,
13 the complaints on their face didn't state claims, we
14 didn't think, or were contradicted by undisputed
15 documents. So right at the very outset we moved to
16 dismiss or alternatively for summary judgment as to
17 some claims. We put the evidence before the Court.
18 Judge Toomey considered it, denied the motion
19 initially and said that they would be allowed to go
20 forward, and reserved ruling, essentially, on it.
21 And asked that -- after they did the discovery they
22 sought to amend their complaint. During that hearing
23 Mr. Benevento, who was then representing the debtors
24 and others --

25 Q. The plaintiffs?

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1 A. Yes. Said that he could take all of the
2 depositions within two months, have the case
3 essentially trial-ready within four months. Because
4 we had told the Court that the pendency of this
5 litigation, the cost associated with the litigation,
6 the impact on the company's ability to function,
7 would destroy the company. And it had -- this case
8 had to be addressed early for the very -- and that's
9 the reason that we moved at the outset to dismiss it
10 for summary judgment.

11 Q. So you wanted a prompt resolution?

12 A. Absolutely.

13 Q. And this case was filed in 2009?

14 A. I think January 2009.

15 Q. Would you look at Exhibit 14, I believe,
16 is the docket for the Toomey case. It's in the --

17 A. I need my glasses.

18 Q. Get your glasses, yeah. It's in the book
19 with the --

20 A. Frankly, they're not strong enough.

21 Q. It's with the numbered depositions, not
22 the lettered depositions. Exhibit 14.

23 A. Yes.

24 Q. Is that, in fact, the docket for the
25 Toomey litigation?

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1 A. Yes. It appears to be so.

2 Q. And would you go to the first entry where
3 there's a date? I think that'll show the actual date
4 of the complaint. Yeah. On page 5 it shows filed
5 complaint on October 26th of '09.

6 A. I stand corrected.

7 Yes. The judge gave them leave to amend
8 the complaint and ordered that they would file an
9 amended complaint forthwith. And you'll see there
10 that they did not do so. Rather than move the case
11 along and do all of the discovery on an expedited
12 basis, nothing happened in the case until we --
13 except its impact on the ability of the company to
14 continue. We ultimately moved to dismiss for failure
15 to prosecute. At that point --

16 Q. Well, let me just get it straight. So
17 although Mr. -- was it Benevento you said was --

18 A. Yes.

19 Q. He represented he'd have all discovery
20 done in two to three months, and he didn't do
21 anything?

22 A. Yes. He went through a long list of all
23 the people he was going to depose before the Court
24 and why he needed to do that. Nothing happened.

25 Q. So after things didn't happen for several

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1 months and because of the impact it was having on the
2 company, you moved to dismiss?

3 A. We moved to dismiss again, this time for
4 failure to prosecute. The Court -- and for failure
5 to file an amended complaint because they had not
6 filed the amended complaint. They filed the amended
7 complaint. The Court gave them additional time to
8 conduct discovery. We had a very expensive and very
9 detailed discovery process thereafter, including
10 taking the deposition of Mr. Freeman, the person who
11 acts for Forge now. And --

12 Q. But he didn't represent Forge in that
13 case. You didn't know about Forge then?

14 A. Mr. Freeman is a close family friend.

15 Q. Okay.

16 A. And after the completion of that we
17 renewed other motion for summary judgment. The --

18 Q. Before we leave that, did you spend quite
19 a bit of money in discovery?

20 A. Lawyers never spend money on discovery.

21 Q. Was money spent on discovery? Was time
22 and energy spent in doing discovery?

23 A. A great deal.

24 Q. And is there a sanction award against the
25 plaintiffs in favor of the defendants in that case?

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1 A. There is a sanction. The judge awarded
2 sanctions for discovery abuses. The amount of the
3 fee has not been awarded.

4 Q. I see. So the liabilities have been
5 determined but the amount has not yet?

6 A. Yes. And in addition to that, after we
7 obtained summary judgment dismissing all of the
8 plaintiffs' claims, the -- we're entitled to our
9 fees. We submitted a fee application. The hearing
10 on that was also pending at the time the --

11 THE COURT: Sorry, Mr. Manning, back up.
12 You said summary judgment was granted dismissing all
13 of the plaintiffs' claims?

14 THE WITNESS: Absolutely. And --

15 THE COURT: And so what remains in the
16 case?

17 THE WITNESS: Well, we have cross-claims
18 in that case; cross-claims and counterclaims. During
19 the course of that litigation, the debtors here were
20 doing a number of things to frustrate the ability of
21 the companies to engage in profitable activity. For
22 example, there was a project called Cresthaven where
23 they had secured HUD financing, nonrecourse
24 financing.

25 MR. BOLEY: Your Honor, I'm going to

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1 object. We're having an attorney testify as fact as
2 to what his claims allegations are.

3 THE WITNESS: I'm --

4 THE COURT: Well, I asked him what was
5 going on with the case. Because, I mean, obviously
6 when he testifies that all the plaintiffs' claims
7 have been dismissed and yet they're listed on
8 schedule B as being viable claims with a value of \$50
9 million, I think that's relevant.

10 MR. SHIELDS: And on cross-examination
11 we'll clarify that statement, which is not entirely
12 correct. I think they're -- I think -- I don't think
13 the question was objectionable or his answer was
14 objectionable. I think part of what the evidence
15 needs to be, Your Honor, is what is the status of
16 that Toomey litigation. And you know, one of the
17 things we're asking for is to proceed with relief of
18 that protective order. And so I think it's very
19 relevant.

20 THE COURT: But just with a protective
21 order or to finish up that litigation?

22 MR. SHIELDS: No, Your Honor, if you look
23 in our reply memo, we have made the decision,
24 partially because of the debtors' objection saying
25 they want to do litigation in all these forums.

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1 We've agreed to limit our relief -- our request for
2 relief in the Toomey case to just having the
3 protective order hearing held. And if that is
4 successful, which we expect it to be, it's all
5 briefed. Then we would be able to use the documents
6 that have been under protective order in the Toomey
7 case in the Forge case. We've also agreed that we
8 would consolidate the two Forge litigations, the
9 Judge Laycock and the Judge Taylor, into one case so
10 that if the stay relief is granted as we've
11 requested --

12 THE COURT: Right.

13 MR. SHIELDS: -- there'd only be one case.
14 I'm sorry, Your Honor. It's probably beyond the
15 question. Mr. Boley didn't object, so I --

16 THE COURT: No, I just can't write as fast
17 as you can talk.

18 MR. SHIELDS: So I will talk a little
19 slower. The bottom line, in our reply memo we have
20 agreed to limit and narrow the relief from stay we're
21 asking for. In the Toomey litigation we're asking
22 just that the stay be lifted such that Judge Toomey
23 can rule on the motion to modify the protective
24 order, which we'll hear in just a minute by this
25 witness. It's fully briefed and ready for a hearing.

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1 We also agree that we will not oppose --

2 THE COURT: I'm sorry.

3 MR. SHIELDS: Okay.

4 THE COURT: The motion to, which has
5 already been filed, a motion to --

6 MR. SHIELDS: Amend the protective order.

7 THE COURT: Amend the protective order to
8 allow the documents to be used in the other
9 litigation?

10 MR. SHIELDS: Correct.

11 THE COURT: Okay.

12 Q. (By Mr. Shields) And why don't we go
13 there. Would you just testify about the status of
14 that motion and when it was heard and whether it's
15 all briefed and those type of things?

16 A. We had obtained a summary judgment order
17 dismissing all of the debtors' claims and the claims
18 of McKay Christensen and the other family members.
19 They dismissed all the claims that were both included
20 in the complaint and all claims that were included in
21 the additional briefing that they did in opposition
22 to our motion for summary judgment. They made a host
23 of additional allegations. You heard Mr. Christensen
24 say, repeat a number of those here today.

25 Q. In fact he's listed them as exhibits -- or

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1 as assets in schedule B, right?

2 A. That's correct.

3 THE COURT: And when was that order
4 entered, Mr. Manning?

5 THE WITNESS: The final order -- and I
6 have my own file here. It -- the judgment signed by
7 Judge Toomey was January 17, 2012, in relevant part.
8 And perhaps Mr. Boley is referring to this is -- as
9 to certain defendants, in that all of the Traverse
10 Mountain defendants -- one of the things that they
11 did in opposition to our last summary judgment motion
12 was to seek to make Mr. Howcroft, who had not
13 previously participated in the litigation, a
14 defendant. And they -- after we had obtained our
15 summary judgment in our favor dismissing all claims,
16 Mr. Howcroft moved on a piggyback motion. The judge
17 said, as to two of the claims that they had asserted
18 against Mr. Howcroft, that there were fact issued on
19 that. So there are two potential claims against
20 Mr. Howcroft.

21 But in relevant part, I'm looking at the
22 judge's order, January 17, 2012. She had previously
23 issued it. It's a significant memorandum decision.
24 The Court has carefully considered all of the
25 arguments and allegations made by plaintiffs, debtors

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1 here, in their joint memorandum in opposition to
2 defendants' motion for partial summary judgment and
3 in support of plaintiffs' motion for Rule 56(f)
4 relief and in their omnibus memorandum in opposition
5 to summary judgment; including the allegations of
6 conduct occurring after the filing of their second
7 amended complaint, and find them to be without
8 factual or legal basis.

9 She then grants summary judgment in favor
10 of Traverse Mountain companies, Mr. Heap, and
11 Mr. Sandlin. And as I say, Mr. Howcroft had only
12 recently been added. He did not participate in that
13 initial summary judgment motion.

14 THE COURT: And other than the appeal that
15 was filed by the Christensens, Mr. Howcroft is the
16 only remaining defendant?

17 THE WITNESS: Yes. But that -- there was
18 an appeal filed. It was entirely improper because
19 there had not been a final judgment entered because
20 we had our pending cross-claims and counterclaims.
21 And they filed a notice of appeal. We told them that
22 it was improper and we would seek sanctions if it
23 wasn't withdrawn, and they withdrew it.

24 THE COURT: All right. So I was looking
25 on the --

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1 THE WITNESS: There is no pending appeal.

2 THE COURT: -- on the docket sheet.

3 There's no pending appeal.

4 THE WITNESS: They did succeed in causing
5 a delay of motions before Judge Toomey, the
6 attorneys' fees and other motions, by filing that
7 appeal. But we were successful in convincing them
8 that they needed to abide by the rules and withdraw.

9 THE COURT: And the motion to modify the
10 protective order, in your view, has been briefed by
11 both parties?

12 THE WITNESS: Yes. We had a hearing set
13 for the motion for modify the protective order. A
14 motion for -- to award -- we sought approximately
15 \$450,000 in fees and costs in defense of the claims
16 brought. And we also sought an additional award
17 pursuant to the sanction award. All of that was teed
18 up to be argued before the Court. And then the
19 bankruptcy happened. They asserted that going
20 forward with any of that would constitute a violation
21 of the automatic stay.

22 THE COURT: When you say "they"?

23 THE WITNESS: The debtors.

24 THE COURT: Okay. Because at some point
25 your clients are saying the same thing in one of the

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1 other actions. So I've been a little confused about
2 who's trying to use the automatic stay as a shield in
3 this case.

4 THE WITNESS: Well, the -- our request for
5 attorneys' fees -- and we filed a motion for relief
6 from the protective order. And the relevant
7 provision of the protective order prohibited the use
8 of evidence gained in that case in any other
9 proceeding.

10 Now, the debtors and their family members
11 filed a separate lawsuit, Land Com, that's also
12 included on the schedules. And they asserted
13 essentially the same claims that were resolved in the
14 Toomey litigation, in both of the Forge, what are now
15 Forge litigations in the U.S. Bank.

16 And those were all dismissed and sanctions
17 awarded in some of them. And we had discovery
18 sanctions pending in the Land Com case because they
19 were trying to relitigate claims made and resolved by
20 Judge Toomey. All of those were stayed at the
21 insistence of the debtors. And so those sanctions,
22 motions, the awards for attorneys' fees, the awards
23 for attorneys' fees in Judge Toomey's case were all
24 stayed. We sought to be able to assert the
25 cross-claims that were asserted in Toomey, or use

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1 that evidence in defense of the Forge litigation and
2 needed relief from the protective order to do so.

3 THE COURT: I understand.

4 THE WITNESS: And that was also stayed.

5 THE COURT: Thank you.

6 Q. (By Mr. Shields) And would you just give
7 the Court a little bit of information about the fact
8 that it was fully briefed. The hearing was
9 scheduled, right, on July 5th? And you had filed
10 supporting motions. Plaintiffs had filed opposing
11 motions, and you'd filed reply memorandum, I mean.

12 A. Yes. And that was not the only motion but
13 that motion was teed up and ready to go.

14 Q. And the other motion was the sanction --
15 or excuse me, the protective order?

16 A. The attorney's -- we had sought attorneys'
17 fees in that case and an award of attorneys' fees for
18 the discovery sanction.

19 Q. Okay.

20 THE COURT: And you're not seeking -- your
21 clients aren't seeking relief from stay on those two
22 issues?

23 MR. SHIELDS: No. Just the relief from
24 the protective order.

25 THE COURT: The attorneys' fees and the

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1 sanctions.

2 MR. SHIELDS: We'll leave those --

3 THE WITNESS: Although, I hope that at
4 some point we --

5 MR. SHIELDS: At some time they'll have to
6 be resolved.

7 THE COURT: I bet you do, yes.

8 MR. SHIELDS: Yeah. At some point they'll
9 have to resolve it. But in order to detract a little
10 bit from the debtors' opposition we're trying to
11 litigate everywhere we said, hey, we'll leave that
12 stay.

13 THE COURT: All right.

14 MR. SHIELDS: It needs to be resolved, but
15 we need that motion for protective order to be heard
16 so that we can use that evidence in the Forge
17 litigation.

18 THE COURT: All right. Thank you.

19 Q. (By Mr. Shields) Give the Court some idea
20 of the amount of dollars involved. Maybe you did and
21 I missed it.

22 A. Well, we were seeking -- with regard not
23 to -- with regard to our claim against -- our
24 cross-claims and counterclaims against the plaintiffs
25 in that case, we were seeking, I think 409 plus

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1 change in attorneys' fees for defense of the
2 counterclaim. And about -- I think it was about
3 \$39,000 in costs for deposition and such things. In
4 defense of the claims that had been brought, I don't
5 know how much of that precisely would be allocated
6 between the briefing on the summary judgments and the
7 motion to dismiss, but that whole effort cost
8 something approaching \$450,000 in fees and costs.

9 Q. Okay. And is -- will the TM parties be
10 prejudiced if they're not able to use the evidence
11 that's under the protective order in the Toomey case?

12 A. I can't imagine why anyone in their right
13 mind would say it is efficient or makes wise use of
14 anybody's resources to go back and do that discovery
15 that I've already done once. It's all there. It's
16 all available. All of the claims are entirely
17 applicable to the Forge litigation. Mr. Freeman has
18 been deposed. We know all about his efforts to
19 cooperate with Mr. Christensen. Not just with regard
20 to Forge but with multiple other people where they
21 were out trying to find people who would buy up the
22 note and then go after the companies and try to get
23 all of the company's assets. All of that discovery
24 is there.

25 MS. OLSEN: Your Honor, I'm going to

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1 object to this testimony on the lines of summarizing
2 and giving their side of what they believe the facts
3 to be through discovery that we haven't had access
4 to, nor can we validate. We move to strike that
5 testimony, Your Honor.

6 THE COURT: Motion is denied. I
7 understand Mr. Manning's testimony simply to be his
8 client's position, his legal opinion and not fact.

9 Q. (By Mr. Shields) Okay. Thank you,
10 Mr. Manning.

11 Let me ask you a couple other questions
12 here. Could you -- we have attached as Exhibit
13 Number 11 the protective order. Could you just
14 briefly describe for the Court what is involved --
15 what issues the Court was scheduled to hear on July
16 5th and what we'll ask the Court to give us relief
17 from stay to hear in the Toomey litigation?

18 A. Sure. If you turn to page 3, Your Honor,
19 scope of the protective order.

20 Q. This is Exhibit 11, right?

21 A. Yes. Exhibit 11. At the bottom of page
22 3, section 2.1.

23 Q. Yes.

24 A. "Except as the parties may otherwise agree
25 or the Court may order, material produced in this

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1 litigation, whether or not designated confidential or
2 confidential attorneys' eyes only, including any
3 excerpt, analysis, summary or description about
4 material, shall be used solely for the prosecution or
5 defense of the above referenced action including
6 appeals."

7 We sought to modify that provision of the
8 protective order so that the materials obtained in
9 the Judge Toomey litigation could be used in any
10 other litigation in which the Christensen parties
11 were involved, including the Forge litigation. And
12 I'm not certain, but I believe we sought a somewhat
13 generic -- any other litigation in which these
14 parties were involved.

15 Q. And who opposed the motion to modify the
16 protective order?

17 A. The debtors.

18 Q. Okay. Any --

19 A. Well, I said -- I'm conflating the
20 debtors. It's not all the debtor. It was all of the
21 defendants --

22 Q. Defendants.

23 A. -- including --

24 Q. Excuse me, plaintiffs. They were the
25 plaintiffs?

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1 A. They were the plaintiffs, yes. All of the
2 plaintiffs, including the debtors.

3 Q. Mr. Howcroft did not though, did he?

4 A. No.

5 Q. Why was the protective order put in place
6 in the first place?

7 A. Well, there are a number of confidential
8 business documents that were being used and exchanged
9 in the litigation. It was important that those
10 documents, we have a means of preserving them. Many
11 of the documents that had been made available we
12 found in the possession of third-parties who were --
13 although it's not clear that they were produced in
14 the litigation, but many of those kind of
15 confidential documents were ultimately in the
16 possession of third parties.

17 Q. And do you believe Judge Toomey will give
18 you a prompt hearing if this Court grants relief from
19 stay?

20 A. Well, if you've been in state court
21 recently --

22 Q. It calls for speculation.

23 A. -- prompt is relative. I'm hopeful that
24 we will have a prompt hearing.

25 Q. Okay.

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1 A. We will certainly seek one.

2 Q. Were you and your office and your clients
3 anxious to proceed with the hearing on July 5th?

4 A. Absolutely.

5 Q. And who said that if you went forward it
6 would violate the stay?

7 A. Why I believe that was communicated
8 through Mr. Christensen, Lavar Christensen.

9 Q. In fact --

10 A. Who is -- the counsel for the sister had
11 been permitted to withdraw just before this case was
12 scheduled to -- these were scheduled to be heard.
13 Mr. -- the counsel for the debtors, Mitchell Barlow,
14 had just been permitted to withdraw. And Lavar
15 Christensen came in, resulting in delays. But he at
16 that point was representing at least the Christensen
17 -- McKay Christensen, the debtors, and the
18 Christensen family. I don't believe anybody --
19 although there was a notice to appear, as to the
20 sister and her family, I don't believe they -- I
21 don't believe that they participated in that.

22 Q. Okay. Would you look at Exhibit 7. It's
23 now been admitted by stipulation. But just so the
24 Court gets some context, who is Sammi Anderson?

25 A. Sammi is one of my partners. She's the

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1 brains in the operation.

2 Q. Have you seen this e-mail before, an
3 e-mail exchange between Lavar and Sammi?

4 A. Yes.

5 Q. Okay. And did you eventually make the
6 decision to not force the issue, not proceed with the
7 hearing? You deferred to Lavar's request and said,
8 okay, let's assume the stay applies at not proceed?

9 A. Well, it's probably not accurate that we
10 deferred to Lavar's request as opposed to we deferred
11 to an interpretation of the stay in fear of Judge
12 Marker that we didn't want to be violating the stay.

13 Q. Did you consider going against parties
14 other than debtors in bankruptcy?

15 A. Yes.

16 Q. And why did you decide not to do that?

17 A. It wouldn't be sufficient relief in that
18 if the -- we don't have the debtors bound by an order
19 that permits us to use evidence from one case in
20 another case. It's not effective.

21 Q. Okay. Now, you've heard the debtor
22 testify. You were here in court when Mr. Christensen
23 testified this morning?

24 A. I was.

25 Q. And you've looked at those bankruptcy

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1 schedules where he identifies those 50 million and
2 those \$25 million claims?

3 A. I have.

4 Q. And are those -- as you read the complaint
5 and as you read and hear his description, have those
6 claims been dismissed as against my client?

7 A. Well, his claims are generic. And I don't
8 know why he has -- his description of his claims are
9 generic. I don't know why he has two separate
10 litigations with -- one with 50 and one with 25
11 million. But as I read from Judge Toomey's order,
12 she dismissed -- he had a claim that he wasn't
13 receiving information. And you heard him repeat that
14 claim today.

15 Q. She dismissed it?

16 A. She dismissed that, absolutely. We
17 demonstrated that he had received everything to which
18 he was entitled and more. And she dismissed that
19 claim. She dismissed everything that was included in
20 the complaint and everything -- their response to our
21 second summary judgment motion was to throw in the
22 kitchen sink about all sorts of additional
23 allegations, most of which you heard today. She
24 dismissed all of those.

25 Q. And that was after discovery, depositions,

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1 production of documents?

2 A. More than two years of discovery on a case
3 that they represented at the outset would be
4 trial-ready within four months.

5 THE COURT: What happened to
6 Mr. Benevento? He withdrew early on?

7 THE WITNESS: Yes. They've gone through a
8 number of lawyers.

9 THE COURT: All right.

10 Q. (By Mr. Shields) How many counsel have
11 represented the plaintiffs in that case?

12 A. They started off at Snell & Wilmer. Then
13 they went to -- well, Kirton McConkie also
14 co-counsel. Then they went through -- then they went
15 to Mitchell Barlow. Then they were permitted to
16 withdraw. And Kirton McConkie was permitted to
17 withdraw. And Lavar Christensen entered an
18 appearance.

19 Q. Current counsel is Lavar Christensen?

20 A. Yes.

21 Q. Okay.

22 MR. SHIELDS: Could I have just one
23 minute, Your Honor?

24 That's all the questions we have for
25 Mr. Manning. Thank you.

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1 THE COURT: Mr. Boley.

2 MR. BOLEY: Thank you, Your Honor.

3

4 CROSS-EXAMINATION

5 BY MR. BOLEY:

6 Q. Mr. Manning, I'm Matt Boley. I represent
7 VS Fox Ridge, LLC.

8 A. Nice to meet you.

9 Q. The water's still here.

10 A. I actually got confused (inaudible).

11 Q. I just want to clarify so that -- there is
12 a partial summary judgment ruling in the Toomey case
13 that was entered at the end of 2011 that dismissed
14 the claims against your clients; is that correct?

15 A. Close. The final order was entered in --
16 I believe in January of 2012. The judge issued a
17 memorandum decision dismissing all the claims, making
18 -- essentially, filing the actual order. I got it
19 right here. It was filed with the district court on
20 January 17, 2012.

21 Q. And that resulted in dismissal of the
22 claims against your clients but not the claims
23 against Mr. Howcroft; is that right?

24 A. Yes. Mr. Howcroft had only recently been
25 added. That was one of the things that they did in

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1 opposition to the summary judgment, they sought to
2 add him at the last minute after the discovery had
3 taken place. The judge allowed them to add him and
4 then allowed them to continue to proceed. She
5 dismissed most of the claims asserted against
6 Mr. Howcroft but reserved on two, I believe.

7 Q. And I believe you testified --

8 A. I don't represent Mr. Howcroft, sorry.

9 Q. I understand that. Thanks for that
10 clarification for the Court.

11 So I understand that the debtors and maybe
12 the other Christensen parties initially attempted to
13 appeal Judge Toomey's ruling. And you let them know
14 that that ruling wasn't right for appeal because it
15 was interlocutory?

16 A. Well, they didn't seek to do it as an
17 interlocutory appeal. They filed a notice of appeal
18 of the non-final judgment.

19 Q. And that -- the debtors' right to appeal
20 is not yet right.

21 A. That's correct.

22 Q. They still have the right to appeal it if
23 they either get leave to take an interlocutory appeal
24 or a final judgment's entered in the case; is that
25 right?

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1 A. That's correct.

2 Q. Now, if you'll turn to Exhibit R. There's
3 a lettered binder there. Exhibit R is a memorandum
4 decision entered by Judge Toomey in June of this
5 year. And this addressed Mr. Howcroft's motion, a
6 motion you weren't involved in; is that correct?

7 A. That's correct. We had already obtained
8 our summary judgment in full.

9 MR. BOLEY: Your Honor, I offer Exhibit R.

10 MR. SHIELDS: No objection.

11 Q. (By Mr. Boley) And Exhibit R -- we won't
12 go through all of the Judge's reasoning --

13 THE COURT: Exhibit R is received.

14 (EXHIBIT R IS RECEIVED.)

15 MR. BOLEY: Sorry, Your Honor. I
16 apologize for being too fast.

17 Q. (By Mr. Boley) Exhibit R, without going
18 through all the reasons, essentially the Court denied
19 Mr. Howcroft's motion for summary judgment.

20 A. I believe that's to two counts only.

21 Q. Claims 1 and 7 remain, is that --

22 A. Yeah. Just looking at the conclusion, for
23 the foregoing reason that the Court grants in part
24 and denies in part Mr. Howcroft's motion for summary
25 judgment. Summary judgment is granted as to all